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Nos. 623 & 624. 22 23 October Term, 1927.

IN THE

Supreme Court of the United States

CHARLES WARNER COMPANY,
Petitioner,

v.

INDEPENDENT PIER COMPANY,
Respondent.

CHARLES WARNER COMPANY,
Petitioner,

v.

Steamship "GULFTRADE," Whereof GULF REFINING COMPANY is Claimant,
Respondent.

On Writs of Certiorari to the Circuit Court of Appeals for the Third Circuit.

Brief on Behalf of Petitioner.

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STEAMSHIP "GULFTRADE" WHEREOF GULF REFINING COMPANY IS CLAIMANT,
Respondent.

ON WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF PETITIONER.

I. OFFICIAL REPORTS OF THE OPINIONS BELOW.

The opinion of the District Court (R., 546) has not been reported.

The opinion of the Circuit Court of Appeals (R., 546) has not been reported.

The opinion of the Circuit Court of Appeals (R., 578) is reported in 20 F. 2d 111.

II. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOLVED.

(1) The decrees to be reviewed are those of the Circuit Court of Appeals dated June 7, 1927 (R., 583, 584).

(2) The petition for writs of certiorari (R., 595) was filed November 17, 1927, and the writs were granted January 3, 1928, which is reported in 275 U. S. 521.

(3) The jurisdiction of this Court is based upon the Circuit Court of Appeals Act March 3, 1891, c. 517, Sec. 6; 26 Stat. 828; as amended March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157, and February 13, 1925, c. 229, Sec. 1, 43 Stat. 938.

III. STATEMENT OF THE CASES.

These cases are before the Court on writs of certiorari to the United States Circuit Court of Appeals for the Third Circuit. The petition was granted by this Court at the October Term, 1927. The Circuit Court of Appeals modified the decree of the District Court for the Eastern District of Pennsylvania (R., 584), which had sustained the libel of the petitioner against Independent Pier Company, owner of the tug "TRITON" and Steamship "GULFTRADE" for damages sustained by the petitioner arising out of a collision between the "GULFTRADE" and a tow of sand scows, owned by the petitioner and in tow of the petitioner's Steamtug "TAURUS" (R., 552). At the time of the collision, the "GULFTRADE" was in charge of two tugs, the "TRITON" and the "CHURCHMAN," and was in command of the master of one of them, the "TRITON."

The libel of the petitioner was *in rem* against the steamship and the two tugs and *in personam* against the owners of the tugs (R., 4). The libel was in the usual form setting forth the facts of the collision, which was one between overtaken and overtaking vessels, the "GULFTRADE" being the overtaking vessel. The fault alleged against the "GULFTRADE" was, that after an agreement had been reached by an exchange of signals, for the "GULFTRADE" to pass on the tow's starboard side, the "GULFTRADE" failed to keep out of the way and ran down the tow.

Process issued, stipulations were filed by the claimants of the vessels involved and issue duly joined by answers filed on behalf of all the respondents (R., 14; R., 23). The sole defense to the allegations of fault was that after the exchange of passing signals, the "TAURUS" and its tow failed to maintain its course and sheered across the course of the "GULFTRADE."

The testimony of the master and several of the officers of the "GULFTRADE" was taken by deposition. The testimony of the officers and crew of the tug "TAURUS," and the men on the scows, was also taken by deposition. On October 8, 1926, the cause came on for trial in the United States District Court for the Eastern District of Pennsylvania and the testimony of the master and officers of the tugs "TRITON" and "CHURCHMAN" was taken in open court.

The District Court filed its written opinion (R., 546) January 12, 1927, sustaining the libel as to the "GULFTRADE" and Independent Pier Company, owner of the tug "TRITON," whose master was in charge of the navigation of the "GULFTRADE," and dismissing the libel as against the steamtug "CHURCHMAN" and the respondent, Alfred C. Churchman, owner of the tug "CHURCHMAN," and ordered a decree to be entered in favor of the petitioner.

In conformity with this opinion, a decree was entered on February 23, 1927 (R., 552). A petition for appeal was filed March 3, 1927, on behalf of Independent Pier Company (R., 554), and on March 10, 1927, on behalf of Gulf Refining Company (R., 560), claimant and owner of the steamship "GULFTRADE." The two appeals were argued together before the Circuit Court of Appeals for the Third Circuit on the eleventh day of May, 1927; one record was printed and the appeals were argued as one and briefed as one and will be so argued and briefed before this Court. On June 7, 1927, the Circuit Court of Appeals handed down its opinion, finding that the tug "TAURUS" was partly at fault for the collision and directing that the damages sustained be divided between the petitioner and the respondents, and the decree of the District Court modified accordingly (R., 578).

A petition for rehearing was filed by petitioner on the sixth day of July, 1927 (R., 585) and denied on August 19th, 1927, by order filed August 23, 1927 (R., 591).

A petition for writ of certiorari was filed in this Court on the seventeenth day of November, 1927 (R., 595), which writ was granted the third day of January, 1928.

The District Court found (R., 546) that the collision, between the "GULFTRADE" and the scows in tow of the "TAURUS," occurred a short distance inside the mouth of the Schuylkill River, after passing signals had been exchanged between the two vessels; that as the "TAURUS" and its tow entered the Schuylkill River from the Delaware, the set of the tide of the latter swung the scows toward mid-channel; that there was room enough and water enough at the time and place for the "GULFTRADE" to have passed the tow in safety on the starboard side of the tow in accordance with the whistle signals exchanged; that the "TAURUS" and its

tow maintained its course and did not sheer on to the course of the "GULFTRADE"; that it was the duty of the tug to keep well to the westward (that is over to port) after the exchange of whistles agreeing to a passage on her starboard, and that, as a fact, the tug did keep well over to port; that the "GULFTRADE" was bound to anticipate that the tow would swing somewhat toward mid-channel as it entered the Schuylkill and that in failing so to do and to make sufficient allowance, in its own course, for this movement, miscalculated and was at fault for the resulting collision.

The Circuit Court of Appeals found the facts of the collision in accordance with the findings of the District Court (R., 578), with one exception, to wit: that the "TAURUS" was not in a position to let the "GULFTRADE" pass when the whistle signals were exchanged and was therefore at fault in assenting to the passage, under the circumstances. It re-affirmed the finding of the District Court that the tug "TAURUS" did not sheer on to the course of the "GULFTRADE" but on the contrary that the set of the tide swung the stern of the "GULFTRADE" to starboard and her bow to port and into the scows. It therefore ordered the decree of the District Court modified and the damages divided between the parties (R., 584).

IV. STATEMENT OF THE FACTS.

The petitioner, at the time of the occurrence of the events out of which this litigation arises, was the owner of a steamtug, the "TAURUS," and the owner or charterer of certain sand scows, known as Nos. 18, 33, 44 and 53.

The "TAURUS" was a small river and harbor tug about sixty-five feet in length. The scows were built

of wood, two of them about one hundred and twenty (120) feet in length, one about one hundred and twenty-six (126) feet in length and the other about the same length, its dimensions not appearing of record. The scows were twenty-six (26) to twenty-eight (28) feet in breadth, were square ended and had no rudders.

On October 1, 1923, the "TAURUS" made up a tow of the four scows referred to, in the Delaware River in the vicinity of Mantua, New Jersey (R., 33), some distance south of the confluence of the Delaware and Schuylkill Rivers. The scows were heavily laden with cargoes of pebbles and said.

The tow was made up two scows abreast. The scows were lashed together with the ordinary and usual lines and were towed on hawsers about one hundred (100) feet in length, running from the stern towing bits of the tug to the port and starboard bows respectively of the port and starboard scows in the first tier (R., 33). It will thus be seen that the tow itself from the bow of the forward scows to the stern of the after scows was about two hundred twenty-five (225) to two hundred fifty (250) feet in length and of a combined breadth of approximately fifty-six (56) feet. The scows drew eight to ten feet of water, and, as has been stated, were heavily laden.

With the tow thus made up, the tug proceeded up the Delaware River bound for wharves on the Schuylkill River where the scows and cargoes were to be delivered (R., 34).

While the "TAURUS" with its tow was proceeding up the Delaware River, the "GULFTRADE," inward bound to the plant of the Gulf Refining Company on the Schuylkill River, was picked up by two tugs, the "TRITON" and the "CHURCHMAN," off Fort Mifflin in the Delaware River (R., 370). The tug "TRITON" and the tug "CHURCHMAN" are harbor tugs.

The "CHURCHMAN" was made fast alongside the "GULFTRADE" on her port bow, just aft the bluff of the bow, and the "TRITON" on her port quarter, the stern of the "TRITON" being slightly forward of the stern of the "GULFTRADE" (R., 370). The masters of both tugs boarded the "GULFTRADE," proceeded to her bridge and took charge of the navigation of the three vessels, the master of the "TRITON" assuming command and the master of the "CHURCHMAN" assisting him on the bridge by transmitting his orders to the tugs alongside (R., 371).

The "TAURUS" and its tow, proceeding up the Delaware River, passed Fort Mifflin before the "GULFTRADE" and her tugs were ready to proceed and when the "GULFTRADE" got under way, the "TAURUS" was a considerable distance ahead of her. The "GULFTRADE," after getting under way, although proceeding slowly, began to overhaul the "TAURUS." The "TAURUS" was moving, and could only move, very slowly with her heavy scows. As the master of one of the tugs testified, the "TAURUS" was going "a little bit faster than the tide" (R., 386). This was the maximum speed and power of which the "TAURUS" was capable under the circumstances, for at all times prior to the collision, she was under full speed.

When the "TAURUS" reached the vicinity of the mouth of the Schuylkill River and the "GULFTRADE" was perhaps half a mile behind her, passing signals of one blast of the whistle were exchanged (R., 372).

Both vessels proceeded and the "TAURUS" and its tow passed into the Schuylkill River, keeping well to the westward of mid-channel. The effect of the flood tide in the Delaware River, however, had a tendency to swing the tow out toward mid-channel during this maneuver. By this time, the "GULFTRADE" was close astern of the tow, perhaps a length or two lengths distant (R., 390), but with plenty of room and plenty of

water to effect a passage to the starboard of the tow. About this time, passing signals were again exchanged and some of the witnesses say that there were three exchanges of signals. The "GULFTRADE," however, in violation of the agreement established, did not keep out of the way of the tow and pass to her starboard but, on the contrary, as she rounded in to the Schuylkill River, the flood tide in the Delaware had the same effect upon her as upon the scows and threw her stern to starboard and her bow to port toward the tow. Those on the "TAURUS" observed the danger and blew the danger signal, four blasts of the whistle (R., 68). The "GULFTRADE," however, continued on, the "CHURCHMAN" at her port bow cast off in time to avoid collision but the port bow of the steamer collided with the starboard scow in the last tier. The lines holding the scows together parted, and the bow of the "GULFTRADE" proceeded on into the stern of the starboard scow in the first tier seriously damaging it so that it filled and capsized (R., 39). Its master and its cargo were lost. The collision occurred about 3.00 o'clock P. M. The weather was fair, there was little wind and the tide was flood.

V. QUESTIONS OF LAW.

The questions of law presented by the petitioner under the above facts and raised in this certiorari are as follows:

1. Does the assent of an overtaken vessel to the passing signal of an overtaking vessel place a burden on the former to keep out of the way of the latter; and to share with her the responsibility of a safe passage; or

2. Does it constitute no more than an assent to the passing at the risk of the overtaking vessel, which is to

be her own judge of the matter of safety in passing and assumes all risks, except such as may be the fault of the overtaken vessel in failure to maintain her course and speed.

VI. SPECIFICATION OF THE ERRORS RELIED UPON.

Petitioner relies upon and assigns the following errors:

1. The Circuit Court of Appeals erred in holding the "TAURUS" at fault.

2. The Circuit Court of Appeals erred in holding that the assent by the "TAURUS" to the passing signal of the "GULFTRADE" under the circumstances, constituted a fault on the part of the "TAURUS."

3. The Circuit Court of Appeals erred in modifying the decree of the District Court holding the "GULFTRADE" solely at fault.

VII. SUMMARY OF ARGUMENT.

The argument of the petitioner may be briefly summarized as follows:

The "TAURUS" and its tow, constituting an overtaken vessel under the rules, assented to the passing signal of the "GULFTRADE," the overtaking vessel. There was plenty of room for the passage to be made but in attempting to do so, the stern of the "GULFTRADE" under the influence of the flood tide, swung to starboard and her bow to port and thus brought the "GULFTRADE" in collision with the lighters. Under the circumstances, the Circuit Court of Appeals held that the assent of the "TAURUS" to the passing signal of

the "GULFTRADE" constituted a fault on the part of the former vessel. This finding is erroneous and clearly out of line with the provisions of the rules of navigation, which require an overtaken vessel, in such circumstances, *only* to maintain her course and speed and place the responsibility for the safe passage upon the overtaking vessel, and is in conflict with the interpretation of those rules by this Court, in *Southern Pacific Company v. Haglund, Admrx et al.* (The "THOROUGHFARE") 48 Supreme Court 510; 72 L. E. 585; 1928 A. M. C. 965; approving the decision in *Atlas Transportation Company v. Lee Line Steamers,* 235 Fed. 492, 5.

VIII. ARGUMENT.

Point 1. It was the duty of the "Gulftrade," the overtaking vessel, to keep out of the way of the "Taurus" and its tow, the overtaken vessel, and the assent by the "Taurus" to the passing signal of the "Gulftrade" constituted no more than an acknowledgment of the purpose of the "Gulftrade," an assent to the passage at her risk, and an agreement on the part of the "Taurus" not to endanger the passage by permitting an interfering change in her position or in the position of her tow.

Before discussing the finding of the Circuit Court of Appeals and the respect in which it is erroneous, brief reference to the Rules of Navigation pertinent and to the decisions interpreting them, should be made.

The situation is that of one vessel overtaking and attempting to pass another and the conduct of the several vessels, in such circumstances, is governed by the following rules.

The Inland Rules provide:

"Rule VIII. When steam-vessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam-whistle, as a signal of such desire, and if the vessel ahead answers with one blast, she shall put her helm to port; or if she shall desire to pass on the left or port side of the vessel ahead, she shall give two short blasts of the steam-whistle as a signal of such desire, and if the vessel ahead answers with two blasts, shall put her helm to starboard; or if the vessel ahead does not think it safe for the vessel astern to attempt to pass at that point, she shall immediately signify the same by giving several short and rapid blasts of the steam-whistle, not less than four, and under no circumstances shall the vessel astern attempt to pass the vessel ahead until such time as they have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals. The vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing.

"Rule IX. Art 23. Every steam-vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse.

"Art. 24. Notwithstanding anything contained in these rules, every vessel overtaking any other shall keep out of the way of the overtaken vessel."

The provisions of the *Pilot Rules* (Rule VI) are substantially the same.

The above rules, and the relative duties of vessels under the circumstances, have been the subject of many decisions, and the law with reference thereto can be summarized briefly, as follows:

It is the duty of an overtaking vessel to keep out of the way of and not crowd the overtaken vessel, and

the burden is upon the overtaking vessel to show not only prudence on her part, but negligence on the part of the overtaken vessel. With respect to the exchange of whistle signals, assent by an overtaken vessel to the passing signal of an overtaking vessel is no more than an assent to the passing at the risk of the vessel proposing it, and merely expresses an understanding by the overtaken vessel of what the overtaking vessel desires to do.

In *Spencer Marine Collisions,* Sec. 69, pp. 172-173, the law is stated as follows:

> "Where two vessels are running in the same direction, one astern of the other, the law imposes upon the one following the obligation of exercising a greater degree of care to avoid collision than is imposed upon the other; the statute requiring every vessel, whether steamship or sailing vessel, when overtaking another to keep out of the way of the one overtaken.
>
> "The duty of an overtaking vessel to keep out of the way is especially imperative when it is a steamer, as it has control over its motive power, and can promptly and accurately govern her own movements. The duty of avoiding the leading ship being imposed by law upon the one following, in case of collision the burden of proof is cast upon the latter to show the prudence of her own conduct, the negligence of the one leading, and that the collision was not caused by fault on her own part.
>
> . . .
>
> "Under the rules no subsequent alteration of the position of the vessels can make the one following other than an overtaking vessel, or relieve her from the duty of keeping clear of the leading ship until fully past and clear; and it is her duty to take such reasonable precautions as may be necessary to avoid the other, the burden of proof being upon her to show that such precautions were timely and sufficient. While the leading vessel has

the right of way, she may not wilfully cross the path of the other without forfeiting all right of recovery for collision ensuing therefrom, even though the overtaking vessel be not wholly without fault."

The overtaking vessel assumes the risk of determining when and where a safe passage can be made after due consideration of all the factors entering into the situation. As was said by Judge Betts in the Steamer "RHODE ISLAND," Olcott 505; Fed. Cas. 11,745:

> "The approaching vessel, when she has command of her movement, takes upon herself the peril of determining whether a safe passage remains for her beside the one preceding her, and must bear the consequences of misjudgment in that respect."

This decision of Judge Betts' in the "RHODE ISLAND" was referred to with approval by the Supreme Court of the United States in *Whitridge, et al., v. Dill, et al.*, 23 How. 448.

The duty of an overtaking vessel *is to keep out of the way of the overtaken vessel.* As was said by Circuit Judge Waddell in the "CITY OF BALTIMORE," 282 Fed. 490, C. C. A. 4th Cir. (1922), at page 492:

> "She was an overtaking vessel, charged specifically with the duty of securing the assent of the other vessel before attempting to pass, and at the same time with the duty of keeping clear and out of the way of the overtaken vessel. Rules of Navigation, article 18, rule 8 (Comp. St. Sec. 7892); also articles 21, 22, 23 and 24 (Sections 7895-7898). The Aureole, 113 Fed. 224, 51 C. C. A. 181; The Sif (D. C.), 181 Fed. 412; Atlas Transportation Co. v. Lee Line Steamers, 235 Fed. 492, 149 C. C. A. 38, The Samarinda, 244 Fed. 744, 157 C. C. A. 192; The Hampden (C C. A.), 276 Fed. 399."

Furthermore, the assent of an overtaken vessel to the passing signal of an overtaking vessel merely expresses an understanding of what the overtaking vessel intends to do and an agreement not to thwart it by any change of course. The most recent expression of this Court on the subject is found in the "THOROUGHFARE," *supra*. The facts in that case are not relevant here but the language of the Court is important. Mr. Justice Sanford in the opinion said (48 Sup. Ct. 511):

> "The 'RELIEF' was not at fault in accepting the passing signal of the 'THOROUGHFARE.' This was merely an assent to the proposed passage in the rear of the 'ENTERPRISE,' expressing an understanding of what the 'THOROUGHFARE' proposed to do and an agreement not to endanger or thwart it by permitting an interfering change in the position of the 'ENTERPRISE.' *See Atlas Transp. Co. v. Lee Line Steamers* (C. C. A.), 235 Fed. 492, 495."

The situation presented in the present case is most nearly paralleled in *Atlas Transportation Co. v. Lee Line Steamers, supra,* approved by this Court in the "THOROUGHFARE." In that case the steamship "REES LEE" attempted to pass the steamtug "JOSH COOK" with four barges in tow, and collided with the barges. Passing signals had been exchanged between the "REES LEE" and the "JOSH COOK," and as to the effect of these signals and the effect of the assent of the "JOSH COOK" to the passing signal of the "REES LEE," the Court said page 495:

> "The Rees Lee had the right to pass the other boat if it could do so with safety to both. It had to be its own judge as to the matter of safety, as whatever risk attended its passage from the narrowness of channel, the shallowness of water, the current, suction, or other causes, except the fault of the Josh Cook, was assumed by the Rees Lee. *The reply of the Josh Cook to the passing signal of the Rees Lee was no*

more than an assent to it, at the risk of the vessel proposing it. It expressed an understanding of what the Rees Lee proposed to do, and an agreement not to thwart it; but the success of the maneuver was at the risk of the Rees Lee." (Italics ours.)

The owners of the "Rees Lee," the overtaking vessel in that case, filed a petition for rehearing *on the ground that the* "Josh Cook" *was negligent in whistling its assent for the* "Rees Lee" *to pass at a dangerous place. Atlas Transportation Co. v. Lee Line Steamers,* (1916) 238 Fed. 349. This petition was denied. The Court said:

> "The Josh Cook by its signal of two whistles (the passing signals) did not assent that the Rees Lee could pass recklessly but only that it could pass safely, if properly navigated. It assented that it could pass at a proper distance and a proper speed. . . . The testimony is convincing that the place was safe for passing, if the Rees Lee had passed slowly."

Proctor for the overtaking vessel filed a petition for writ of certiorari to the Supreme Court, which petition was refused, *Lee Line Steamers, Petitioner, v. Atlas Transportation Company,* 243 U. S. 643.

Point II. The "Taurus" Was Not Guilty of Fault in Assenting to the Passing Signal of the "Gulftrade" and the Circuit Court of Appeals Erred in so Finding.

The situation and the duties of the respective vessels, with reference thereto, being clear, a brief discussion of the issues, the findings and rulings of the District Court and the Circuit Court of Appeals, clearly indicates that the decision of the latter Court was erroneous.

In this case, the "GULFTRADE," while proceeding under her own power and in charge of two tugs, ran down the burdensome, heavy tow in clear weather and in the day time, causing loss of life and property. The sole defense pleaded and urged at the trial and upon argument before the Circuit Court of Appeals was that immediately preceding the collision, the "TAURUS," heavily burdened as she was, failed to maintain her course and speed, but sheered to the starboard so that the scows in her tow were carried to starboard and across the course of the "GULFTRADE."

Both the District Court and the Circuit Court of Appeals found against the "GULFTRADE" on this issue, the collision being explained by the Circuit Court of Appeals in the following language (R., 580):

> "When her bow (referring to the 'GULFTRADE') at the slow rate of speed she was going was turned into the dead water of the Schuylkill, her stern was naturally swinging farther and farther up the Delaware so that she had to round up also from her position, and meanwhile her stern being carried up the Delaware, her bow naturally tended over to the western bank of the Schuylkill and headed in that direction while she was being straightened out."

While the above may have been a natural movement on the part of the "GULFTRADE," it was something which the "TAURUS," an overtaken vessel, was not bound to anticipate as causing a condition dangerous to a passage. This was a situation wholly within the control of the "GULFTRADE." She had two powerful tugs accompanying her lashed to her port side, one at the bow and one at the stern, and these tugs could have been maneuvered to hold her bow off to starboard and her stern to port as she entered the Schuylkill and to prevent them swinging into collision with the scows in

tow of the "TAURUS." It was clearly no part of the duty of the "TAURUS" to anticipate that the "GULFTRADE" would fail to control her movements and by such failure convert a situation safe for passage into an unsafe one.

Under the decisions, this was wholly the duty of the "GULFTRADE." The risk of the maneuver was wholly upon her and it was the duty of the "TAURUS" only to maintain her course and speed or to give way to port, which she, in fact, did and which it has been found that she did by both courts having the matter under consideration.

The District Court in this connection said (R., 550):

> "The tug in charge of the tow knew that the steamship must hug more or less closely mid channel whereas the tug and its tow were not so restricted. This made it the duty of the tug to keep well to the westward and this we find as a fact it did so far as conditions present did not prevent."

The Circuit Court of Appeals was satisfied that the tug was out of the channel and bearing to the westward, but that the tail of the tow was still in the channel when the collision occurred. It said, referring to the effect of the tide on the "TAURUS" and its tow (R., 580):

> "The result would naturally be that while the 'TAURUS' may have been and probably did go to the westward of the channel herself, that the tail-end of her tow was considerably out into the mid-channel of the Schuylkill and it would take time to straighten out her tow. We are satisfied from the proof and the circumstances that the tail of the tow was still in the channel when the collision occurred."

Both courts also found that the "TAURUS" did not sheer across to starboard and on to the course of the "GULFTRADE." The District Court said (R., 549):

> "there is a like improbability that the tug sheered to the eastward because there was no reason for her to do so, and even if she did, the first effect of the movement would have been to have carried the stern scows not into but away from the course of the steamship. . . . The fact that the towing tug to counteract the second swing of her tow and straighten it out ported her helm for a moment is of no significance. It was a called for thing to do and did not contribute to the collision."

The Circuit Court of Appeals said (R., 579):

> "It is unreasonable to suppose that the 'TAURUS,' if she and her tow were out of the channel, took a sheer to get into it."

It is thus clear that both lower courts dismissed the allegation of fault against the "TAURUS," to wit, that she sheered into the course of the "GULFTRADE," and found that she maintained her course and speed. This was her obligation under the law, and this obligation she fulfilled.

In the face of these findings, however, the Circuit Court of Appeals found that the "TAURUS" was partly at fault for the collision in assenting to the passing signals of the "GULFTRADE." The following language, from the opinion of the Circuit Court of Appeals, gives the ground for its decision (R., 581):

> "When the whistle of the 'GULFTRADE' blew, the 'TAURUS' certainly was not in a position to let the 'GULFTRADE' pass in safety, but she, nevertheless, agreed that the 'GULFTRADE' come ahead. Later on, the 'GULFTRADE' evidently became anxious and blew another blast, to which the 'TAURUS' gave the same consent to go ahead, and while there is some question as to whether the 'GULF-

TRADE' blew a third blast and got the same consent, we are inclined to think she did. Now it seems to us that under the circumstances, the 'TAURUS' was in fault in giving these three consents to the 'GULFTRADE' to come ahead, relying too much on her ability to get out of the channel."

In making these findings, the Circuit Court of Appeals erred in the following respects:

(a) *That at the time the passing signals were exchanged, the "TAURUS" was not in a position to let the "GULFTRADE" pass in safety.*

It was not contended by any of the parties to this cause at any time during the proceeding that at the time the passing signals were exchanged, the two flotillas could not have passed each other with safety. There is no intimation of this in the pleadings, nor in the briefs, nor in the argument before the District Court or the Circuit Court of Appeals.

A brief reference to the testimony indicates that the witnesses on both sides agreed that until a few moments prior to the collision, the courses of the vessels were such that the passage could have been effected with safety and there is no intimation anywhere in the record that the "GULFTRADE" could not have held her course over to starboard if she had so desired.

The Master of the "TRITON" testified that after the third whistle signal was blown there was sufficient clearance room for the "GULFTRADE" to pass the tug sixty or seventy feet. His testimony is as follows (R., 380):

"Q. If the 'TAURUS' had held her course, that is the course that she was on before she took that sheer, and the 'GULFTRADE' had held her course then, would there have been clearance room for the two tows, and if so what would have been the distance between them in passing?

"A. At that time I should say that we would have gone by her sixty to seventy feet.

"Q. And you were standing there looking at them all of the time?

"A. Yes, sir.

"Q. Would that have been a safe clearance in your opinion or not?

"A. Yes, sir.

"Q. From your experience in taking vessels up there would there have been danger in passing that close?

"A. I do not think there would have been any danger in passing that close to them.

"Q. Were you in the channel?

"A. Yes, sir; we had to keep in the channel there with that deep draft vessel."

The master of the "CHURCHMAN," also on the bridge of the "GULFTRADE," testified to the same effect (R., 325-26) and stated that if the "TAURUS" and the "GULFTRADE" had maintained their respective courses at the time the last whistle signal was exchanged, the "GULFTRADE" would have passed the tow fifty to seventy-five feet from her. The master of the "GULFTRADE" stated that when the "GULFTRADE" was two hundred feet astern of the tow, the tow was one hundred feet off to her port (R., 506). The pilot of the "TRITON" testified to the same effect, saying that at the time the last one-blast whistle signals were exchanged, the "TAURUS" was about four points off the port bow of the "GULFTRADE." The second officer of the "GULFTRADE" testified to the same effect (R., 523, 524, 530). The effect of the testimony of the witnesses from the tug "TAURUS" is the same (R., 37, 60, 73, 115, 137).

The answers of both the Independent Pier Company and the Gulf Refining Company, respondents, state that there was ample width of channel room and

the two flotillas were in a position to pass in safety after the exchange of signals (R., 20, 27).

In view of the pleadings, testimony and the position taken by the parties to this litigation, it is difficult to see how the Circuit Court of Appeals could have reached the conclusion referred to, and which seems to be negatived by its own explanation of the collision that the bow of the "GULFTRADE," turning into the dead water of the Schuylkill, swung to port as her stern swung to starboard.

Clearly, the Court was in error in this respect, but even assuming the fact as found, the Court erred in its interpretation of the Rules of Navigation under the circumstances and in finding:

(b) *That the* "TAURUS" *was at fault for assenting to the passage by the* "GULFTRADE."

Under the rules and the cases referred to under Point I, the only duty on the part of the "TAURUS," after the exchange of passing signals, was to maintain her course and speed and she was not at fault in assenting to the passage by the "GULFTRADE" unless it was unsafe for the "GULFTRADE" to attempt to pass at that point because of some danger apparent to the "TAURUS" and not to the "GULFTRADE," such as a necessary change in the course of the "TAURUS" or some other condition known to herself and not to the overtaking vessel.

The assent by the "TAURUS" to the passing signal of the "GULFTRADE" amounted to this: That the "TAURUS" knew the "GULFTRADE" would attempt to pass; that the "TAURUS" undertook to maintain its course and speed and that so far as those in charge of it could see, there was no danger in the passage because of the place chosen therefor and because of anything or any circumstances for which the tug and its tow were responsible.

It has been found by both Courts that the "TAURUS" maintained its course and speed and did not sheer to starboard on to the course of the "GULFTRADE" as alleged by that vessel.

On the other hand, under the law, the burden was upon the "GULFTRADE" to pass with care at a proper place and at a proper distance from the tow. It was the duty of the "GULFTRADE" to determine whether she would pass the "TAURUS" at the particular point chosen.

The situation was obvious to those in charge of the "GULFTRADE." Her officers and the masters of the two tugs, who were all on her bridge, knew what she was drawing, what depth of water she would need, what depth of water was available and the width of the channel. They could see the "TAURUS" going off to port and her tow swinging somewhat to starboard from the effect of the flood tide. They testified that they were in a position when they rounded into the river to pass the "TAURUS" in safety, but whether they could or not was a matter for their judgment and theirs alone and was something with which the officers of the "TAURUS" were in no way involved. The "TAURUS" was only bound to warn the "GULFTRADE" as to dangers not obvious to that vessel.

As was said by Circuit Judge Woods in the "DORSET," C. C. A. 4th Cir. (1919) 260 Fed. 32, in commenting upon the decision in *Atlas Transportation Co. v. Lee Line Steamers*, page 34.

> "Atlas Trans. Co. v. Lee Line Steamers, 235 Fed. 492, 149 C. C. A. 38, is relied on as holding the signal of the Crisfield and the assent of the Dorset imposed no obligation on the Dorset but that was an overtaking case where ordinarily *there is no duty on the overtaken vessel except to keep her course unless she perceived danger not obvious to the overtaking vessel.*"

IX. CONCLUSION.

Further comment is unnecessary. The law is clear as to the duties and responsibility of overtaking and overtaken vessels respectively, and it is well established that the burden of passage is not shared equally between the two. The overtaking vessel must keep out of the way. She must pick the place of passage. She must pass at a proper distance. She must observe care in the matter of speed, and an overtaken vessel has no duty or obligation whatsoever, except to maintain her course and speed, or unless she knows of some danger not obvious to the overtaking vessel.

In the present case as far as the "TAURUS" was concerned, it was perfectly safe for the "GULFTRADE" to pass. It was found by both Courts that the "TAURUS" maintained her course and speed, and furthermore gave way to port to give the "GULFTRADE" all the passageway possible. She was not required to do this by the rules, but on the other hand, the rules contemplate that the overtaking vessel shall steer to port or to starboard after receiving an assent to a passing signal in order to keep out of the way of the overtaken vessel. There is no indication in the record that such a change of course was made by the "GULFTRADE," but insofar as the "TAURUS" was concerned there was no reason why the "GULFTRADE" should not pass at such place as was safe having regard to the draft of the "GULFTRADE," the width of the deep water channel and all other factors known to her own navigators and to be considered in passing at a given point. The "TAURUS" therefore assented to the passage, and it was then the obligation of the "GULFTRADE" if she had room to pass at that point to port her helm to round the "TAURUS." If there was not room enough at that particular point to effect the passage with safety, the obligation was

upon the "GULFTRADE" to wait until there was such room or such depth of water. This she failed to do, but there was no obligation upon the "TAURUS" to anticipate her failure to do so.

The decision of the Circuit Court of Appeals, however, imposes that duty upon the overtaken vessel and places upon it too great a burden, going far in the directing of making both the overtaking and overtaken vessel assume an equal share of the responsibility for a safe passage.

In so holding, the decision is at variance with the well established rules on the subject and should be reversed and the decision of the District Court affirmed.

Respectfully submitted,

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